NO. 89-524

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In the
Supreme Court of the United States

OCTOBER TERM, 1989

SAMMILINE COMPANY, LTD.
and
HIGHTWORTH SHIPPING, LTD.
Petitioners,

v.

JOHN WOODS, BEVERLY WOODS,
COOPER/T. SMITH STEVEDORES
and
PIONEER NAVIGATION, LTD.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN RESPONSE
OF PIONEER NAVIGATION, LTD.

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QUESTIONS PRESENTED

1. Respondent Pioneer Navigation, Ltd. is satisfied with the presentation of Question 1 made by Petitioners Sammiline Company, Ltd. and Hightworth Shipping Ltd., which is as follows:

> Where a foreign, independent stevedore stows cargo aboard a vessel in a manner that allegedly causes an injury to a longshoreman employed by a second independent stevedore while the cargo is being discharged, and where the cargo stowage condition allegedly causing the injury is open and obvious and known to the discharging stevedore and his longshoremen, did the Fifth Circuit err in holding that the vessel's owner and operator owe a duty under Section 5(b) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §905(b) and this Court's opinion in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981), to protect the injured longshoreman from the alleged unsafe condition in the cargo stow?

Questions 2 & 3 should be more accurately set forth, as follows:

2. Where the evidence at trial established that the vessel's owner and time charterer both participated in decisions concerning cargo loading, but only the vessel owner's crewmen were aboard the vessel during discharge when the plaintiff longshoreman was injured, allegedly as the result of unsafe conditions in the cargo stowage, did the Fifth Circuit correctly refuse to shift to the time charterer that percentage of fault assessed against the vessel owner for its own direct negligence where the time charter did not contain any contractual indemnity provision in favor of the shipowner?

3. Whether the Fifth Circuit correctly allocated between two joint tortfeasors, on a pro rata basis according to the respective percentage of liability of each, the liability assessed against a statutorily immune stevedore employer who was not a defendant to the lawsuit?

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STATEMENT OF THE CASE

Respondent Pioneer Navigation, Ltd. ("Pioneer", the time charterer) concurs in the Statement of the Case submitted by Petitioners (Sammiline Company, Ltd. and Hightworth Shipping Ltd., the vessel owners), insofar as that statement relates to Question 1 regarding interpretation of this Court's *Scindia* decision; however, Pioneer submits the following additional facts with reference to Questions 2 & 3 raised by Petitioners:

Pioneer respectfully submits that Petitioners' writ application omitted important facts regarding the activities of the shipowner's crew during cargo loading operations. These omissions are later rectified, but only partially, in the reply brief of Petitioners wherein it is conceded (at pp. 3-4) that, "the evidence does indicate that the vessel's chief mate reviewed the stowage plan and approved it, and that he checked the cargo lashings." Petitioners proceed to claim, however, that these activities did not result in "assumption of control" or "participation" in cargo operations because the chief mate's activities related solely to matters affecting the vessel's navigational safety. Pioneer submits that the evidence at trial showed complete retention of shipowner control throughout the charter period and the full, active participation in cargo loading by the vessel's crew that plainly went beyond navigational safety. As previously noted by Respondents John and Beverly Woods, the vessel's chief mate reviewed the stowage plan and approved it and, by his own admission, the chief mate inspected all cargo as it was loaded and stowed. Additionally, several other witnesses testified at trial that the ship's command retained ultimate authority to make changes to the cargo plan and also retained final authority regarding the actual stowage of cargo prior to the vessel's departure from Brazil. Petitioners also fail to note that the self-

serving, conclusionary testimony from the Master and Chief Officer concerning authority and control was contradicted by the totality of that testimony, by Pioneer's witnesses, by several independent witnesses, and, at the end, by the jury. It should also be noted that at New Orleans, the port of discharge where the longshoreman's injury occurred, Respondent Pioneer had no agents, employees or representatives aboard the vessel having any power or authority to influence cargo discharge. Pioneer's only representative was an independent cargo surveyor dispatched solely to note and photograph any cargo damage occurring during discharge. Petitioners, however, maintained a full crew aboard the vessel during discharge, including the same Master and Chief Officer who had inspected and approved the loading of the vessel.

There is no evidence that there had ever been any change in the vessel's discharge rotation. Only a marine surveyor hired by the plaintiff's employer testified that it "appeared" to him that the ship had been loaded with the intent that if first be offloaded at Houston, but he had nothing further to offer other than his own speculation. There was no evidence from any vessel's or charterer's personnel that a change in discharge rotation had been made because, in fact, no such change had been made. Finally, with respect to the argument that the Houston cargo could have been unloaded in New Orleans prior to discharging the New Orleans cargo, it is uncontradicted that no one present in New Orleans, including the stevedoring company, ever suggested to vessel or charter interests that this be done. While it is true that this would have made discharge more expensive, the senior vice president for the stevedore testified that time-charterer Pioneer had never before been unreasonable in following any recommendations made by the stevedore regarding cargo handling. Thus, if this had been considered by those present at the time, there was no

reason for the stevedore to refrain from making the suggestion because the stevedore would have been paid the extra discharge costs. The vessel interests relied upon the expert and experienced stevedoring firm of Cooper/T. Smith Stevedores to make all decisions regarding the discharge of cargo from the M/V SAMMI HERALD, but no request or suggestion to offload the Houston cargo was ever made at this time. The fact is that discharge had proceeded without incident for two and one-half hours before plaintiff's accident and was subsequently resumed and completed without incident and without any change in the discharge method or procedure.

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING THAT A SHIPOWNER OWES A DUTY TO DISCHARGING LONGSHOREMEN CONCERNING THE OPEN AND OBVIOUS CONDITION OF CARGO STOWED BY INDEPENDENT CONTRACTOR STEVEDORES CONFLICTS WITH THIS COURT'S *SCINDIA* DECISION AND WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

A conflict exists within the circuit courts of the United States regarding the liability of a shipowner for open and obvious cargo stowage conditions which result in injury to discharging longshoremen. The circuit courts have acknowledged this conflict. For example, in the instant case, the Fifth Circuit, in referring to the case of *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1733 (1988), stated that, "At least one court has accepted this [Petitioners'] argument under remarkably similar circumstances." (Petitioners' Appendix A, p. 9a) The Fifth Circuit also stated, "Our court, however, has already visited this question and reached the opposite result." (Petitioners' Appendix A, p. 10a)

The *Derr* court had previously noted the conflict existing within the various circuit courts of appeal. Referring to *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), the Third Circuit flatly stated, "We cannot accept the *Turner* analysis." 835 F.2d at 494. Moreover, in referring to various Fifth and Eleventh Circuit opinions, the Third Circuit remarked that, "It is true that some courts of appeals have read the law in a manner compatible with appellants' arguments." 835 F.2d at 494. Nonetheless, the Third Circuit rejected these arguments of the plaintiff longshoremen in *Derr*. These exact arguments were accepted by the Fifth Circuit in the instant case.

The alleged factual distinctions between *Derr* and the instant case are not significant. The Woods assert that in *Derr* the vessel interests did not inspect the loading, that the district court in *Derr* did not reach the issue of the vessel's actual knowledge of improper stowage, and that there was no evidence of a change in discharge rotation. However, the *Derr* court indeed acknowledged that the cargo had been inspected by an independent cargo surveyor hired by the vessel and that the chief mate had observed the condition of the cargo. 835 F.2d at 497. Also, while the district court did not reach the issue of actual knowledge of improper stowage, this was irrelevant to the *Derr* court because, as in the case at hand, the stowage condition was open and obvious and because the chief mate had knowledge of the alleged condition, having observed the cargo. Finally, there was no evidence in the record of this case that the discharge rotation had been changed from Houston to New Orleans, but, in any event, this would not affect the operative fact that the condition was open and obvious.

This Court should review this issue and restore uniformity to an important area of maritime law.

II. THE FIFTH CIRCUIT CORRECTLY REFUSED TO SHIFT TO THE TIME CHARTERER THAT PERCENTAGE OF FAULT ASSESSED AGAINST THE VESSEL OWNER FOR ITS OWN DIRECT NEGLIGENCE WHERE THE APPLICABLE TIME CHARTER DID NOT CONTAIN AN INDEMNITY PROVISION IN FAVOR OF THE SHIPOWNER AND WHERE THE EVIDENCE AT TRIAL ESTABLISHED THAT BOTH THE VESSEL'S OWNER AND THE TIME CHARTERER PARTICIPATED IN DECISIONS CONCERNING CARGO STOWAGE.

Respondent Pioneer submits that granting of a writ of certiorari with respect to the second question raised by Petitioners is not appropriate. Petitioners attempt to create a conflict among the circuit courts of appeal by arguing that the Fifth Circuit decision of *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966), *cert. denied* sub nom., *Southern Stevedoring & Contracting Co. v. D/S Ove Skou*, 400 U.S. 902 (1970) conflicts with the decision of the Second Circuit in *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2d Cir. 1976) and the Ninth Circuit decision of *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). However, *Ove Skou* was not controlling in the instant case on the indemnity issues and, instead, both parties were held responsible based upon their own percentage of fault.

All claims against Pioneer would have been dismissed had Petitioner's version of *Ove Skou* been followed, but

the District Court, in denying the claims for indemnity asserted by both Petitioners and Respondent, did not even mention the *Ove Skou* decision. (Petitioners' Appendix D, p. 37a, *et seq.*) Furthermore, the Fifth Circuit, in reviewing Respondent Pioneer's claim for indemnity under *Ove Skou*, noted that the *Ove Skou* holding did not apply where there was evidence that the time charterer exercised operational control over the loading operation. Indeed, the Fifth Circuit in the instant case noted, "...this is precisely the case contemplated in *Ove Skou* in which we stated that there may be 'circumstances which would give rise to liability for actions taken by an independent contractor'." (Petitioners' Appendix A, p. 30a) To the extent that the time charterer did exercise control, the Fifth Circuit, like the other circuit courts, held that the time charterer would be liable for its negligence. Similarly, to the extent the shipowner retained operational control over cargo operations, it would be found liable for its own negligence. *Ove Skou* is not mentioned by the Fifth Circuit in discussing Petitioners' claim for indemnity. Stated differently, this admiralty claim was tried to the jury on a comparative negligence basis, which has been the rule in maritime cases since this Court's decision in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). Each defendant was assessed only for its own negligence and, because the time charter does not contain an indemnity clause, the Fifth Circuit correctly ruled that neither party was entitled to indemnity from the other for damages related to a cargo condition created jointly by both parties.

The District Court in the instant case, after hearing the evidence, was "... unpersuaded that the parties intend ed Clause 8 to shift to the time charterer the shipowner/operator's responsibility for its own independent acts of negligence." (Petitioners' Appendix D, p. 39a)

Therefore, the court looked to the specific facts presented at trial and to the jury's interpretation of those facts. The Fifth Circuit, reviewing these findings, held that, "Each party exercised some control over cargo operations...each such party therefore was charged with a duty to third parties regarding the manner in which the cargo was stowed. Because they have not, by contract, shifted their responsibility...neither party is entitled to indemnity from the other." (Petitioners' Appendix A, pp. 30a-31a) This decision is not based on *Ove Skou*, does not give rise to any conflict within the circuit courts and, based as it is on jury findings resulting from the specific facts of this case, does not raise an important issue of law requiring review by this Court.

It is also to be noted that *Ove Skou* was decided in 1970, when a shipowner could be held liable to injured longshoremen on account of unseaworthiness, which imposes liability without fault, a remedy that was not available to longshoremen at the time of this case in which negligence is the predicate to recovery, and also before this Court's *Reliable Transfer* decision in 1975 which apportions fault according to the participating negligence of the parties to the damage action.

III. THE FIFTH CIRCUIT CORRECTLY ALLOCATED BETWEEN TWO JOINT TORTFEASORS, ON A PRO RATA BASIS ACCORDING TO THE RESPECTIVE LIABILITY OF EACH, LIABILITY ASSESSED AGAINST THE LONGSHOREMAN'S STATUTORILY IMMUNE STEVEDORE EMPLOYER.

Petitioners finally request review of the Fifth Circuit's holding that the shipowner and time charterer in the instant case must share responsibility for the negligence of the injured longshoreman's stevedore employer. There were arguments raised in the lower courts by both Peti-

tioners and this Respondent that neither should be found responsible to any extent for the negligence of plaintiff's stevedore employer. Petitioners argued that the time charterer, Pioneer, who hired the stevedore, should bear full responsibility for the stevedore's fault. Respondent Pioneer, on the other hand, argued that because the stevedore's negligence occurred at New Orleans, where there were no representatives of Pioneer aboard the vessel, only the shipowner was in the position to take preventive measures and reduce the likelihood of injury, as discussed in this Court's decision of *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 314 (1964). The district court did not adopt either argument, but instead allocated fault on a pro rata basis based upon the negligence against each defendant. The Fifth Circuit found no error in this allocation, "notwithstanding the defendants' competing arguments." (Petitioners' Appendix A, p. 31a) The Fifth Circuit noted that the jury had found that the actions of both parties led to the accident and, accordingly, allocation on a pro rata basis was "entirely reasonable", *Id.*; and active negligence has long been held to preclude indemnity at law as distinguished from express contractual indemnity. Petitioners now argue that there is no policy or legal reason why the shipowner should bear responsibility for the negligence of a party hired by another, but there is also no reason why the time charterer should bear responsibility when the shipowner's representatives were aboard the vessel and in the best position to prevent the negligence of that independent contractor. The stevedore employer is staturorily immune from suit and pro rata allocation of damages between joint tortfeasors for the negligence of an immune defendant has long been accepted by the courts. Such an allocation in this case does not present a question of importance to the general maritime law and further review by this Court is unnecessary.

CONCLUSION

Respondent Pioneer agrees that a writ of certiorari should be granted in this case to review the Fifth Circuit's holding that a shipowner owes a duty to discharging longshoremen concerning an open and obvious condition of cargo stowage created by independent contractor stevedores. By the Fifth Circuit's own statement, this holding is in direct conflict with the holdings of the other circuit courts of appeal. Additionally, we submit that it conflicts with the standards enunciated by this Court in the *Scindia* decision. Further, a review of the decisions of other circuit courts of appeal on this issue reveal disharmony, contradiction, and uncertainty. Accordingly, this Court should act to restore uniformity to the law on this important federal maritime question.

Further review is unwarranted and unnecessary with respect to the other questions for review raised by Petitioners. The Fifth Circuit and District Court decisions in this case on the time charter issues were based upon a reading of the contractual clause in question (which does not mention indemnity), upon an interpretation of the intent of the parties to the contract, and upon the actual activities undertaken by the parties in this case. No general principles of law were enunciated and, contrary to Petitioners' assertion, the interpretation of the specific contract in this case simply does not present a question of great importance to the maritime law or to vessel owners and charterers, who are free to contract expressly with respect to indemnity. Furthermore, the decision of the Fifth Circuit in this case does not in any way conflict with the indemnity decisions of other circuits, none of which have specifically addressed the same factual situation.

With regard to Petitioners' argument that this Court should grant a writ to consider the allocation of stevedore fault in this case, there are competing arguments available to both Petitioners and Respondent which under the specific facts of this case do not raise questions of compelling importance to the general maritime law, and there is no reason further to review the District Court's original decision to allocate responsibility for the stevedore employer's fault on a pro rata basis, unless the Court desires to consider setting aside its decision in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

Respectfully Submitted,

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